BRIEF OF AMICUS CURIAE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 560.

EARLE W. HILTON, *Petitioner*,

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Amicus Curiae.

JOHN C. WILLIAMSON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Preliminary Statement	2
Statement of Interest	2
The Facts	3
The Issue	3
The Argument	4
The Conclusion	14

TABLE OF CASES CITED.

Fishgold v. Sullivan Drydock and Repair Corp., 328 U. S. 275	11
Gray v. Powell, 314 U. S. 402, 412-413	12
Myers v. United States, 272 U. S. 52	8
Robertson v. Downing, 127 U. S. 607	12
Trailmobile Company v. Whirls, 331 U. S. 40	11
United States v. Hill, 120 U. S. 169	12
United States v. Jackson, 280 U. S. 183, 193	12
United States v. Philbrick, 120 U. S. 52	12
Wallace v. United States, 257 U. S. 541	8

STATUTES CITED.

Act of August 15, 1876 (19 Stat. 169)	4
Act of August 23, 1912 (37 Stat. 413)	5
Selective Training and Service Act of 1940	9
Sec. 8	9, 10, 11, 12
Sec. 8(c)	3, 9, 10, 11
Veterans Preference Act of 1944	2, 3, 6, 8, 9, 10
Sec. 12	3, 4, 7, 9, 13
Sec. 18	10

ORDERS AND REGULATIONS CITED.

Departmental Circular No. 146, U. S. Civil Service Commission, October 22, 1936	6
Executive Order No. 3367, dated October 24, 1921	5

Page

Executive Order No. 3801, dated March 3, 1923, amending Civil Service Rule XII 5
Executive Order No. 4240, dated June 4, 1925 5
Retention Preference Regulations for Use in Reduction in Force 4
11 F. R. 6957 4
11 F. R. 8205 4
11 F. R. 9003 4
11 F. R. 9977 4
12 F. R. 59 4
12.301-12.302, 5 C. F. R. (1945 Supp.) 4
12.303 et seq., 5 C. F. R. (1945 Supp.) 4

40 Opinion Attorney General No. 115 (Sept. 20, 1946) p. 4 12

MISCELLANEOUS.

Carrow, Milton M., *The Background of Administrative Law* 12
House Report No. 1289, 78th Congress, 2d Session 6
H. R. 4115, 78th Congress, 2d Session 6, 7
90 Cong. Rec., Part 3, 3502-3505 7

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BRIEF OF AMICUS CURIAE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, IN SUPPORT OF RESPONDENT'S PRAYER FOR AFFIRMATION OF THE JUDGMENT OF THE COURT BELOW.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

I. Opinions Below.

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51-52) is not reported. The opinion of the United States Court of

Appeals for the District of Columbia (R. 53-56) is reported at 165 F. 2d 251.

II. Preliminary Statement.

The petitioners have filed herein a petition that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia, which affirmed a judgment in favor of the defendant-respondents entered by the District Court of the United States for the District of Columbia. This Court granted certiorari. The Veterans of Foreign Wars of the United States is desirous to support the prayer of defendant-respondents that the decision of the Court of Appeals for the District of Columbia be affirmed.

Counsel for the petitioner and the Solicitor General of the United States, as counsel for the defendant-respondents, have consented to the filing of this brief.

III. Statement of Interest.

This organization, the Veterans of Foreign Wars of the United States, whose members to the number of approximately two million of the former overseas members of the Armed Forces of the United States, who have fought our country's battles in all wars and officially recognized military and naval expeditions, on foreign shores and in hostile seas, speaking in their behalf, and feeling that it also expresses the wishes of all others who have been numbered among those who have suffered the economic and social dislocation incident to service in the cause of our country's honor and prestige and in the preservation of her democratic institutions, wish to inform the Court that our organization and these veterans, including the widows of those who have made the supreme sacrifice, are vitally and intensely interested and concerned in the issue involved in this case and its outcome as it affects them and the benefits which are theirs under the provisions of the Veterans Preference Act of 1944 (58 Stat. 387).

IV. The Facts.

The facts, as to which there is no dispute, are as follows: Petitioner was employed at the United States Navy Yard at Charleston, South Carolina, as a permanent employee in the classified Civil Service. On January 7, 1946, petitioner was demoted from the position of Shipfitter, Leadingman, at $12.08 per diem, to Shipfitter, with a maximum of $10.08 per diem. On November 8, 1946 he was furloughed without pay for a period of one year as a result of reduction of personnel in the Navy Yard. He had completed more than twelve years' continuous service and his efficiency rating was "Excellent"; and he was not entitled to preference on account of military service.

Petitioner was one of many employees furloughed because of reduction in personnel; and selection of the employees for furloughing was in complete accordance with the regulations promulgated by the United States Civil Service Commission, pursuant to the Veterans Preference Act of 1944. Other permanent employees with "good" or higher efficiency ratings with less service than petitioner, but entitled to military preference, were retained in employment.

V. The Issue.

The issues as found in the pleadings, exclusive of the specific harm or damage alleged to be suffered by the petitioner, is alleged to be, that the Civil Service Commission is without authority in law to issue the Rules and Regulations it did under the provisions of Section 12 of the Veterans Preference Act of 1944 (and known as the Retention Preference Regulations for use in Reductions in Force), and their action in this respect is unreasonable, arbitrary and capricious, without statutory warrant and contrary to the provisions of Section 8(c) of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. Appendix), and Section 12 of the Veterans Preference Act of 1944 (58 Stat. 390, 5 U. S. C. 861), in providing priority in retention to veterans as same is set out in said regula-

tions, paragraphs 12.301-12.302 and 12.303 et seq., 5 C. F. R. (1945 Supp.), 11 F. R. 6957, 8205, 9003, 9977, 12 F. R. 59.

VI. The Argument.

a. Retention of veterans in preference to non-veterans on reduction in force is consistent not only with language of Sec. 12, Veterans Preference Act of 1944, but with intent of Congress in approving said Act.

The numerous authorities cited by learned counsel for both petitioner and respondents in their respective briefs disclose that "veterans preference" is by no means a new development in this nation's approach to the problem of employment for its veterans; but on the other hand, by virtue of law, regulation, and Executive Orders, has been a continuous, developing and expanding process since approximately 1876.

The Veterans of Foreign Wars of the United States feels that the concept of "veterans preference" in federal employment has its genesis and development in the recognition by a grateful people, expressed through their representatives in the Congress, that service in the Armed Forces of the United States in times of war is an extraordinary albeit essential duty of citizenship; and that such service invariably manifests itself in an economic dislocation of the veteran from the normal processes of our competitive society.

"Veterans preference" in reduction-in-force in Government employment first manifested itself in the Act of August 15, 1876 ([illegible] Stat. 169; 5 U. S. C. 37), which provided as follows:

> In making any reduction of force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors.

From the enactment of the Act of August 15, 1876, *supra*, the attitude of the Congress and the President toward this

policy of veterans preference in reduction-in-force has been an ever-expanding one.

The Veterans of Foreign Wars of the United States has over a period of forty years applied itself diligently to the strengthening of the principle of veterans preference in appointment, and retention on reduction-in-force. The statutes and Executive Orders of the past thirty-six years bear testimony to the widening of this concept of veterans preference, and the unvarying intent of successive Congresses and Presidents to insure the veteran, not only a preference on appointment in the Government service, but on retention should the exigencies of economy in Government require a reduction in Government employment.

The legislative policy estalished in 1876 was first broadened by the Act of August 23, 1912 (37 Stat. 413) which contained a proviso as follows:

> * * * in the event of reductions being made in the force of any executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

Your attention is called to the Executive Order of the President issued under authority of the Act of August 23, 1912, *supra*, on October 24, 1921, being Section 7 of Order No. 3567, expanded March 3, 1923, by Order No. 3801, amending Civil Service Rule XII, extending preference in retention of veterans to the field service.

By Executive Order No. 4240, June 4, 1925, length of service was given some recognition, *but a veteran with efficiency rating good or better was preferred in retention regardless of length of service.* Only as against veterans with efficiency ratings lower than "good" was a nonveteran given a right to retention by reason of greater length of service.

In 1936 the regulations governing reductions of force were by direction of the President extended to Government positions which were not under the Civil Service sys-

tem. (Departmental Circular No. 146, U.S. Civil Service Commission, October 22, 1936).

From 1876 until the enactment of the Veterans' Preference Act of 1944, therefore, the Government had observed a continuous policy of granting to veterans with "good" or higher efficiency ratings absolute preference in retention in employment over nonveterans, without regard to length of service, under authority of various statutes, Executive Orders and administrative regulations.

With the approach of the recent conflict, and our eventual involvement therein, the question of the attitude of our Government towards the members of the Armed Forces, the economic and financial dislocation resulting from induction or enlistment, the economic effects of such dislocation during the aftermath of war when they had assumed the status of "veterans", was of great concern to those in both the executive, legislative and administrative branches of Government.

At the same time the question of revitalizing the pattern of "veterans preference" in Government employment was being developed aggressively by the leaders of the Veterans of Foreign Wars of the United States.

The net result of all this concern and attention was the presentation of what was known as H.R. 4115, 78th Congress, and its eventual enactment by Congress, and known as the "Veterans Preference Act of 1944", and it was in connection with said law that the regulation was issued about which the issue in this action was raised.

If there is any doubt as to the purpose and intent, by law, to give veterans preference in employment and retention in Government employment in preference to all other competing employees, a reading of the report of the Committee on the Civil Service of the House of Representatives should quickly dispel such doubt. House Report No. 1289 (to accompany H.R. 4115), 78th Congress, 2d Session, March 27, 1944, expresses the opinion of the Committee as follows:

> • • • The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions.

The import of the testimony on the bill H.R. 4115, *supra*, and of the debate on the floor of the House of Representatives (90 Cong. Rec., Part 3, 3502-3505) is unmistakable that section 12 of the Veterans Preference Act was intended to continue in effect the practice of giving absolute preference in retention to veterans without regard to length of service, which retention policy had been in effect in the departmental service since 1912 and in the entire Government service since 1923.

It is our belief that no one accepting employment in a Government position, and who becomes a permanent employee, much less those in other categories, has a vested right in such position or one of equal status and pay.

Therefore, it is our contention that any one who enters the employ of the Government, does so with the full knowledge and understanding that the Congress, in giving him tenure in such employment as well as other advantages, may if it desires alter the law, to change, destroy and remove all protection and advantages theretofore granted.

Certainly every one entering the employ of the Government in the last thirty-five or more years cannot be heard to say he was not conversant with the policy of the Government in granting and providing preference to veterans in employment and retention therein.

An employee has no general and undefined right to retention in Government service solely by virtue of his civil service status. While Congress may limit and restrict the power of removal the normal rule is that, in the absence of any express contrary provision, the power of removal is incident of, and follows, the power of appointment. See

Wallace v. *United States*, 257 U.S. 541, 544; *Myers* v. *United States*, 272 U.S. 52, and cases cited.

If this is so, the matter at issue here resolves the question as to whether the Veterans Preference Act of 1944 grants absolute preference to veterans in retention in employment if their efficiency is good or better as compared to the nonveteran in any category covered by the Act, irrespective of length of service. We think the Act says so, and further, that is what it was intended to express.

Petitioner contends that the pertinent regulation on retention preference is void because absolute preference is given to veterans with permanent tenure, whereas the statute requires that due effect must also be given to length of service and efficiency ratings. This the Civil Service Commission has done by classification as to tenure, as between permanent employees, war service employees, and temporary employees; then within the above classifications are contained sub-classifications giving due effect to military preference and efficiency ratings. Within the sub-classifications due effect is given length of service.

If, as petitioner contends, the factor of length of service is given primary importance, then the factor of military preference would apply only as between veterans and nonveterans with equal length of service. To sustain such a contention would be to deny veterans all but the most paltry preference under the guise of a "Veterans Preference Act"; and "veterans preference", as over twenty million veterans have come to know the phrase, might henceforth well be re-phrased a "veterans mite". The contention of petitioners on this proposition is clearly untenable.

The statute requires only that the Civil Service Commission regulations give "due effect" to the above-named criteria. The requirement to give "due effect" does not imply that these factors should be weighed with an apothecary's scales so that the effect of one shall not fade in comparison with the effect of another. On the other hand it is

the bounden duty of the Civil Service Commission in applying the "due effect" provision to consider the object sought by the Congress in enacting the Veterans Preference Act. The "due effect" given length of service must necessarily be such as would be consistent with the over-all intent and purpose of the Congress in providing this unequivocal language in the second proviso of Section 12 of the Act as follows:

> * * * *Provided further,* That preference employees whose efficiency ratings are "good" or better *shall be retained in preference to all other competing employees* (italics supplied) and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings. * * *

The language of this proviso is unmistakable. However, in the face of this unmistakable language petitioner, nevertheless, requests the Court to substitute its evaluation of the relative weight to be applied the four statutory factors for that of the Commission.

b. The absolute preference accorded veterans for retention for one year following reemployment after World War II service is a valid exercise of authority granted the Commission under Sec. 8, Selective Training and Service Act of 1940.

The Congress in enacting the Selective Training and Service Act of 1940 appropriately concerned itself with the readjustment of the prospective inductees into the normal civilian processes of society when their period of service in the armed forces had been completed.

Appropriately enough the Congress in the language of Section 8 of the Act of 1940 made it mandatory that a Government employee who leaves his position to enter the military service shall upon discharge from the armed services be restored to his former position. Section 8(c) of the Act of 1940 further provides that the returning employee

"shall not be discharged from such position without cause within one year after such restoration."

The absolute retention rights of veterans for one year following discharge from the armed services is required by Sec. 8 of the Act of 1940 and the promulgating of the appropriate regulation for retaining these veterans in an unqualified retention status for one year was the only method by which the Commission could effectuate the provisions of the Act.

It is difficult to conceive how the Commission could have qualified this mandatory one year retention in the light of the clear and unmistakable language of the Act.

Petitioner contends that Section 8(c) of the Act of 1940 was repealed by implication upon enactment of the Veterans Preference Act. This contention is advanced in the face of the following language of Section 18 of the Act of 1944:

> Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

It is the firm belief of our organization that petitioner's contention represents a gross mis-evaluation of the intent of the Congress—that the Congress in the guise of enacting beneficial legislation for veterans in obtaining and retaining Government employment would at the same time repudiate a clear and unmistakable assurance made to them when they were inducted in to the armed services. The implication cannot be seriously advanced that the Congress on the one hand would tender assistance to the discharged veteran with respect to obtaining "new" Government employment, and with the other hand repudiating a previous pledge that he would be restored to his position in Govern-

ment service for one year, if he left that position to enter military service.

Petitioner relies on *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275; and *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 56-57 to support his contention that a veteran had no right to absolute retention during the first year of employment following discharge from the service. The *Fishgold* case, *supra*, dealt with the return of a veteran to private employment, and the actual holding of the Court was that where the veteran was furloughed for short periods of time *pursuant to the terms of a union contract*, it did not violate the non-discharge provisions of Section 8 of the Act of 1940. However, the *Fishgold* case, *supra*, dealt with the question of seniority rights fixed by union contract; whereas the Commission's regulation covering the absolute one-year-retention group is based on a right fixed by statute.

In the *Whirls* case, *supra*, this Court limited its consideration to "sole question presented on the merits, namely, whether under section 8 the veterans right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues". This Court then proceeded with the question of the status of the veteran during the one-year absolute retention period: (The *Whirls* case, *supra*)

> There can be no doubt whatever that Congress intended by Sec. 8(c) to secure the "other rights" guaranteed by it for at least the minimum term of the prescribed one-year period. This indeed was a specific ruling of the *Fishgold* case.

It is respectfully submitted that if the Congress intended to secure the "other rights", i.e. seniority, insurance or other benefits, for one year, then surely the right of the veteran to be secure in his position for that period was of paramount consideration by the Congress. It would be

of small benefit to the veteran to be secured in his seniority rights for one year, if he were not secure in employment for that one-year period.

Petitioner contends that the Commission's regulation providing absolute one-year retention for veterans is invalid because it was promulgated under the assumption that this unqualified one-year retention was mandatory by virtue of Section 8 of the Act of 1940. Following the opinion of this Court in the *Fishgold* case, *supra*, and upon request of the Civil Service Commission, the Attorney General rendered an opinion that the absolute-one-year retention group was "valid and designed to effectuate the provisions of Section 8". (40 Op. Atty. Gen. No. 115, Sept. 20, 1946). Construing the language in favor of petitioner, it might well be that the Attorney General did not believe that this special retention group represented a mandate of the Congress. However, the regulation in question is no less appropriate, nor is its legal efficacy the less diminished, if it (regulation) exists in accordance with the discretion and judgment of the Commission, than if it existed by virtue of a direct mandate of the Congress.

The Court of Appeals, below, held that the retention-in-force regulations of the Commission were not unreasonable, arbitrary or capricious in these words:

> * * * We cannot say that this is an unreasonable method of applying the wholly general directives of the statute. We cannot, therefore, hold the regulations void.
>
> * * * We think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive the courts must leave it there.

In *The Background of Administrative Law* by Milton M. Carrow, published in 1948, we find (p. 155) under the heading "Scope of Judicial Review":

> Our system of government, politically as well as constitutionally, requires a check upon all official action,

be it legislative, judicial, executive, or administrative. One check upon administrative action is by means of appeal or review to the courts, as independent bodies. Acting as a check, of course, *does not mean the substitution of discretion or judgment, but simply the detection and suppression of arbitrary action.* (italics supplied)

This court has repeatedly held that the interpretation placed on a statute by the agency of the Government charged with its administration is entitled to great weight. See *Gray* v. *Powell*, 314 U. S. 402, 412-413, and *United States* v. *Jackson*, 280 U. S. 183, 193. In the below-mentioned three cases the Court has held that in the absence of patent error or arbitrary or capricious action administrative interpretations of long standing should not be lightly overturned by the Courts.

United States v. *Philbrick*, 120 U. S. 52,
United States v. *Hill*, 120 U. S. 169,
Robertson v. *Downing*, 127 U. S. 607.

If this Court decides that the retention regulations of the Commission are unreasonable, arbitrary or capricious, then this organization must conclude with no little dismay that its forty years of efforts in behalf of veterans, their widows, and the wives of our seriously disabled veterans, in this respect, are barren of result. This organization would then have grave doubts as to all expressions of policy and intention, as crystalized over a long period of years in practice by and through the use of what is clear and easily understood language as it appears in said Act, and which is without ambiguity of any sort and easily understandable.

In the light of the language of Sec. 12 of the Veterans Preference Act clearly expressing the intent and policy of the Congress and Government, we feel that the regulations here in question, promulgated by the Civil Service Commission governing reductions in force are within the Com-

mission's legal power and authority to issue, and that such regulations implemented the Act clearly and understandably in respect to the rights of veterans to retention in preference to all other competing employees in the service, under a reduction in force of Governmental employees.

The law and the regulations in question may be harsh, applied to any one situated as petitioner is, but the plight of the veteran who sustained the economic dislocation of war service is more so, and in the light of this service rendered the Government and his fellow citizens, we as an organization have always felt and practiced that, as respects Governmental employment, the concept of effective veterans preference in appointment and retention should be and is Government policy, and we conclude that such is the case in view of the law and attitude of governmental agencies, legislative, excutive and administrative.

VII. Conclusion.

For the foregoing reasons, we respectfully submit that the decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

VETERANS OF FOREIGN WARS OF THE UNITED STATES
Amicus Curiae

JOHN C. WILLIAMSON
Counsel.

April, 1948.

SUPREME COURT OF THE UNITED STATES

No. 560.—October Term, 1947.

Earle W. Hilton, Petitioner, *v.* John L. Sullivan, Secretary of the Navy, Frances Perkins, Harry B. Mitchell and Arthur Flemming, Members of the Civil Service Commission.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 1, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the relative rights of war veteran and nonveteran employees to retention in government service when a program of reduction in the number of government civilian employees makes it necessary for some to be chosen for discharge. The acute point of controversy is this: In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to nonveterans, even though those nonveterans have served the Government a substantially longer time than the veterans. The questions depend upon whether certain regulations promulgated by the Civil Service Commission are valid under a proper interpretation of controlling statutes.

The petitioner was for twelve years, from 1934 to 1946, a duly appointed permanent status civil service employee working in the Charleston Navy Yard. His work was of such high quality as to earn him an efficiency rating of "Excellent." By successive promotions, he arrived at the responsible position of Leadingman Shipfitter at a basic wage of $12.08 per day. January 7, 1946, shortly after the post-hostility reduction of governmental employees began, petitioner was demoted to a position paying $10.08 per day, as part of a reduction in force. This

demotion apparently was due in part to the fact that he did not have a veteran's preference. October 7, 1946, petitioner was notified that due to curtailment of work and funds it was necessary to eliminate certain positions in his competitive level and that in accordance with civil service regulations his name had been reached for action. He was told that, if he approved, he was then to be placed in a one-year "furlough status" rather than absolutely separated from service because it was hoped that conditions might justify his recall to duty within the year. He was also informed that his "active service" had already been terminated and that unless sooner recalled to duty he would be separated for reduction in force at the end of his one-year furlough period.

The civil service regulations said to require termination of petitioner's active service divide government employees into three main groups—A, B, and C. Group A, which has the highest priority for retention, is composed of "permanent employees"; groups B and C are composed of employees with limited tenures of employment. Group A is divided into five subgroups, the first three of which are of particular importance here. These three subgroups are:

> Subgroup A–1 Plus, [Veterans of World War II] for a one-year period after return to duty;
>
> Subgroup A–1, Veteran's preference employees with "good" (or higher) efficiency ratings;
>
> Subgroup A–2, Employees without veteran's preference with "good" (or higher) efficiency ratings.[1]

The result of these Commission groupings is that A–1 Plus veterans have the highest retention priority; A–1

[1] The remaining two subgroups of A, not involved here, are:
Subgroup A–3, Veterans with efficiency ratings lower than "good."
Subgroup A–4, Nonveterans with efficiency ratings lower than "good." 5 Code Fed. Reg. (Supp. 1945) § 12.303, now found in 5 Code Fed. Reg. (Supp. 1947) § 20.3 (a).

the second; and A–2, in which, not having a veteran's preference, petitioner is classified, has the third. Thus if these regulations are valid, every member of both Subgroup A–1 Plus and Subgroup A–1 must be retained in preference to petitioner.

After receiving notice of his one-year furlough, petitioner filed this complaint in district court for declaratory judgment, mandamus, and other relief. The defendants were the Secretary of the Navy and the members of the Civil Service Commission. The complaint charged that petitioner's demotion and furlough were the result of the Commission's regulations which prescribed retention priorities for veterans' preference employees in A–1 Plus and A–1 over all nonveteran employees without regard to the longer periods of service of some of the nonveteran employees, including petitioner. The failure of the Commission to consider relative length of service in establishing these retention priorities was charged to be "unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions" of applicable statutes. The petitioner's prayer was that the Commission's A–1 Plus and A–1 classifications be declared void, that the Secretary of the Navy be compelled to restore him to his original position as Leadingman Shipfitter, that the Commission be required to rescind the regulations and promulgate new ones in accordance with law, and that "such other and further relief as is just" be granted him. After answer and certain stipulations of fact, both parties moved for summary judgment and the government's motion was granted. The Court of Appeals for the District of Columbia affirmed. 165 F. 2d 251. Importance of the questions raised prompted us to grant certiorari. 333 U. S. —.

First. While admitting petitioner's right to challenge the validity of Subgroup A–1 in this action, the Government contends that he cannot challenge A–1 Plus. The premise of this argument is that, even if A–1 Plus were

invalid, the veterans grouped in it would fall within Subgroup A–1. We find no adequate support for this premise in the record. Veterans in Subgroup A–1 Plus could not qualify for A–1 unless they had efficiency ratings of "good" or better. But the language defining A–1 Plus includes veterans of all ratings, even below "good." And when the summary judgment in this case was rendered, 61 of the 118 veterans comprising A–1 Plus had not been rated at all. True, the Government asserts that 60 of these veterans have now been rated "good" and the sixty-first member has resigned. But the potential membership of Subgroup A–1 Plus is not limited to those veterans who were in it when the case was tried. The classification provides for a continuing status of preference of one year for all returning veterans who left government employment for war duty. There is no indication that additional war veterans qualified for classification under A–1 Plus will not return to Charleston Navy Yard and reclaim shipfitter jobs in preference to otherwise qualified nonveteran employees. And the Government does not claim that this classification has been repealed or altered so that in the future it can include only those veterans who have an efficiency rating of "good" or higher. Under these circumstances we are unable to say that all members of A–1 Plus could qualify or will be able to qualify as members of A–1. Therefore we cannot accept the government's contention that petitioner's likelihood of injury from A–1 Plus is too remote to justify his attack on it. If invalid, there is as much reason for his right to challenge this subgroup as for his right to challenge Subgroup A–1.

Second. The Government finds support for Subgroup A–1 Plus in § 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U. S. C. § 308. That section provides reemployment rights to any person who under that Act left a position other than a temporary

one in order to perform training and service in the armed forces and who satisfactorily completed his training. It further requires that upon appropriate application after release from training, such person, if still qualified to perform the duties of his old job and "if such position was in the employ of the United States Government, . . . shall be restored to such position or to a position of like seniority, status, and pay." Section 8 (c) also provides that a person so restored to his old position "shall not be discharged from such position without cause within one year after such restoration."

There appears to be little room for contention that there is ambiguity in the language that Congress selected to express its purpose to require the restoration of a former government employee who entered the armed forces to his old position and to give him the right to retention for a year. The language is that such an employee "shall be restored" to his position or to one like it, supplemented by language that he "shall not be discharged from such position without cause within one year after such restoration." We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. The command in § 8 (b) (A) that the Federal Government rehire its returning veteran employees contrasted sharply with the requirement in § 8 (b) (B) that a private employer need not reemploy such a veteran when "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." This difference was noted by the congressional sponsors of the 1940 Act, who thought that the Federal Government should set an example to private industry by providing jobs for all returning veteran employees.[2]

[2] Hearings before House Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess. 80–82, 118, 235; 86 Cong. Rec. 11697.

Congress, having thus provided that the veteran who left a government job must be reemployed, also required his retention by declaring that he should not be discharged within a year without cause.

Petitioner contends, however, that this Court's interpretations of § 8 (b) (B) and § 8 (c) in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, and in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275, require a holding that the regulations establishing A–1 Plus are invalid. The *Trailmobile* case dealt only with the obligations of a private employer to veterans after the first year of their return to his employment, and our holding there is of no relevance here. In the other case, Fishgold, following his discharge from the armed forces, had been restored to his old position by his former private employer. Within one year thereafter temporary layoffs became necessary on each of nine days. Fishgold was laid off while nonveterans with longer service were continuously kept at work in accordance with a collective bargaining agreement which required that "decreases" in the working force be based primarily upon "length of service." This Court held that since Fishgold's layoffs were temporary, he still retained an employment relationship, and thus had not been "discharged" within the meaning of § 8 (c). The statute was held not to require that when slack work compelled a private employer to lay off some workers temporarily a veteran restored to his job be given continuous work for one year after his reinstatement in preference to other nonveteran employees who under the terms of company employer-employee contract were entitled to such work by reason of their greater "length of service."

There are several reasons why we cannot accept petitioner's argument that the *Fishgold* case requires the invalidation of the A-1 Plus classification. In the first

place, we are here concerned with the one-year retention rights of veterans restored under § 8 (b) (A) to their old jobs with the Federal Government, not, as in the *Fishgold* case, with the rights of veterans restored to jobs in private industry under § 8 (b) (B). We have previously pointed out that Congress in § 8 (b) (A) imposed a mandatory and unconditional reemployment obligation upon the Federal Government; in other words the section guaranteed that a returning veteran would get back his job with the Government. But § 8 (b) (B) imposed no such unconditional guarantee that a returning veteran would be reemployed by his former private employer. For that subsection does not require restoration of returning veterans to their former private jobs "if the employer's circumstances have so changed as to make it unreasonable or impossible" to rehire him.

Thus Congress, evidently considering that there were significant differences in industrial and governmental employment practices and potentialities, imposed obligations to rehire returning veterans of a markedly different nature upon government and private employers. It did not define the "unreasonable or impossible" circumstances that might relieve a private employer of the duty to rehire veterans, nor need we attempt to do so now. But it is plain that such circumstances might conceivably be such as seriously to affect, not only the reasonableness and possibility of rehiring, but also the reasonableness and possibility of retaining him for a full year's continuous work. For this reason, among others, interpretation of § 8 (c)'s prohibition against discharge of a returning veteran must be made in light of whether he returns to a government-guaranteed or to a private non-guaranteed job. Therefore § 8 (c)'s prohibition against "discharge" by a private employer cannot be accepted as determinative of the scope of the congressional prohibition against "discharge" by the Government.

The foregoing distinction is illustrated by the fact that civil service workers, unlike the private employees in the *Fishgold* case, are not confronted by a situation in which their employer, the Government, has an outstanding contract with them providing that they shall be retained in service in proportion to their "length of service" as reductions in force become necessary. Whatever seniority rights government employees have when discharges or reductions in force are made depend entirely upon congressional acts and regulations issued in harmony with them. See 37 Stat. 555, 5 U. S. C. § 652. We have discovered no acts or regulations which can be construed to recognize a nonveteran's length of government service as a factor sufficient to override the requirement of § 8 (b) (A) and § 8 (c) that a veteran must be restored to his old job with the Federal Government and cannot be discharged therefrom without cause for one year. Thus, unlike the employees in the *Fishgold* case whose private-employment contract-derived seniority prevented their being laid off, petitioner has no comparable statutorily derived seniority rights to his job with the Government. Petitioner argues, however, that § 12 of the Veterans Preference Act of 1944, 58 Stat. 390, 5 U. S. C. § 861, in effect amended § 8 and conferred retention rights upon him based upon his length of service. For the reasons we give below in discussing the validity of Subgroup A–1, we think this contention is without merit.

Finally, the *Fishgold* decision held only that a temporary layoff did not violate a veteran's right under § 8 (c) not to be discharged without cause for one year after he had been restored to his old job. Here the petitioner asserts that the statutory one-year prohibition against discharge confers upon a reemployed veteran no security from a furlough for one year without pay, that such a furlough is not a "discharge" within the meaning of

§ 8 (c). The Commission has here treated a furlough of more than thirty days as the equivalent of a discharge. This is in accordance with prior governmental practice which has considered that the furlough of a veteran with military preference violates regulations providing that he shall not be "discharged or dropped" when "reductions in force are being made."[3] Moreover, § 14 of the Veterans Preference Act, which safeguards preference eligibles against administrative denial of their preference rights, specifically places furloughs and suspensions for more than thirty days without pay on the same basis as discharges. Thus, the common meaning of furlough in governmental practice is not the same as that which the Court in the *Fishgold* case found to be the meaning of "layoffs" and "furloughs" in "industrial parlance." To give this one-year "furlough" any less meaning than the statutory word "discharge" would result in depriving government employee veterans of the entire congressional guarantee of a year's retention in their old jobs. We hold that the furlough, if applied to veterans, would be a "discharge" within the meaning of § 8 (c). Consequently, the Commission acted within its statutory duty by providing veterans a preference against such removals by establishing Subgroup A–1 Plus.

Third. Petitioner strongly urges invalidity of Subgroup A–1, which gives all permanent employee "Veterans with 'good' or higher efficiency ratings" retention preferences over all nonveterans, even over nonveterans with higher efficiency ratings and longer government service. While conceding that under some limited circumstances veterans with "good or higher ratings" are granted preference by § 12 of the Veterans Preference Act of 1944, petitioner argues that the section does not require but actually

[3] See 40 Ops. Att'y Gen. 115 (Sept. 20, 1946) 7, referring to Opinion, Attorney General Mitchell in 1929, interpreting Executive Order 5068, March 2, 1929. The substance of that Order is set out in this opinion at p. 13.

prohibits any preference for veterans over nonveterans which fails to give substantial weight to a nonveteran's longer government service. The Government urges that the section requires an absolute retention preference for veterans who have the required efficiency ratings without regard to the fact that nonveterans may have had longer government service. An alternative argument is that, whether absolutely required or not, the Commission's subgrouping is well within the power to promulgate "rules and regulations" specifically authorized by § 12. The question presented is therefore one of interpretation of the relevant language of § 12.

The part of the section on which petitioner particularly relies reads:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service . . ."

Petitioner interprets this portion of § 12 as a congressional command that the Commission must invariably give "due effect" to length of service in determining what employees, whether veterans or nonveterans, shall first be discharged in a reduction-of-force program. In effect he argues that the above language provides no other "military preference" in civil service for a veteran employee over a nonveteran with greater "length of service" than that defined in the above proviso, namely, that the length of a veteran's army service shall be credited in computing the length of his total government service.

The part of § 12 on which the Government supports the Commission's recognition of a veteran's absolute retention preference without regard to comparative length of service of veterans and nonveterans follows immediately after that section's language on which petitioner relies, and reads:

> ". . . *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings. . . ."

The Government interprets this proviso as a special withdrawal of the proviso-defined classes of veterans from the general terms of the first clause of § 12 relating to "length of service." It views this proviso as the congressional creation of classes of veterans' "preference employees"[4] who "shall," if they have the defined efficiency ratings, "be retained in preference to all other competing employees" without regard to length of service as between veterans and nonveterans. Thus, under the government's interpretation, length of service would be given the "due effect" required by the first clause of § 12 by its consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. This interpretation of the proviso and the section, it is argued, would give meaning to all the language used in them, is plainly called for by the language, and harmonizes this portion

[4] The Act not only provides preferences for veterans but under certain circumstances grants preferences to veterans' wives, widows and mothers. § 2, 5 U. S. C. § 851, as amended by Pub. L. No. 396, 80th Cong., 2d Sess. (Jan. 19, 1948). See H. R. Rep. No. 1289, 78th Cong., 2d Sess. 3.

of the Act with all its other parts and with the Act's broad purposes. The interpretation is compelled, so the Government argues, by the Act's legislative history, particularly when the proviso and preceding clauses in the section are viewed in the light of a long series of prior congressional enactments and authorized executive orders granting preferences in government employment to veterans and their close relatives. We agree with the Government that in the light of the foregoing factors no other interpretation of the pertinent parts of the section can fairly be reached.

In 1876, seventy-two years ago, Congress passed a law which required any executive department when making "any reduction of force" to "retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors." 19 Stat. 143, 169; 5 U. S. C. § 37.[5] In 1912 Congress greatly strengthened the old 1876 policy by providing that "in the event of reductions being made in the force in any of the executive departments, no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary." 37 Stat. 360, 413.[6] There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably

[5] Disabled veterans had been granted employment preferences in 1865. 13 Stat. 571. This statutory policy was expressly preserved by § 7 of the Civil Service Act of 1883, 22 Stat. 403, 406, was carried forward in other Acts, and has been repeated in a most comprehensive manner in § 2 of the Veterans Preference Act of 1944.

[6] It is of interest that this legislative expression, like the one before us, was a proviso in a section, and that the section as a whole had to do with the manner in which the Civil Service Commission should provide for efficiency ratings in relation to promotions, demotions and dismissals of civil service employees.

discharged veteran government employee with a rating of "good." Length of service in no way qualified the preference given the veteran. And subsequent executive orders not only recognized this provision as giving veterans an absolute preference, but also extended the preference to veterans in the field service [8] and to positions not under civil service.[9]

Executive Order 4240 of June 4, 1925, as amended by Executive Order 5068 of March 2, 1929, provided, as does Subgroup A–1 here, an absolute retention preference for veterans over nonveterans where the veterans' efficiency ratings were "good," and a similar absolute preference over nonveterans whose ratings were less than good if the veterans' ratings were equal to those of the nonveterans. And at the time of passage of the Veterans Preference Act of 1944, there were 1943 Civil Service Regulations outstanding [10] which granted veterans with permanent tenure and with a rating of "good" or higher, precisely the same absolute retention preference over nonveterans which is now afforded by Subgroup A–1, here attacked as invalid. Consequently, a holding that veterans with a rating of "good" no longer have a retention preference over nonveterans with longer service, would mean that passage of the Veterans Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government

[7] § 7, Executive Order 3567, October 24, 1921.

[8] Executive Order 3801, March 3, 1923.

[9] Departmental Circular 146, U. S. Civil Service Comm'n, October 22, 1936.

[10] 5 Code Fed. Reg. (Supp. 1943) §§ 12.301–12.313. These regulations, like those attacked here, separated all civil service employees into different categories according to their tenure, with permanent employees having the highest retention status. Thus all permanent employees, regardless of veteran's preference and of efficiency rating, enjoyed priority over all employees with limited tenures.

personnel. The purpose of that Act's sponsors and of Congress in passing it appears to have been precisely the opposite—to broaden rather than narrow the preference.

The Senate Civil Service Committee was told by the congressional sponsor of the measure that "this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden and implement the veterans' preference policy heretofore in effect," and that it would "give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government. . . ." [11] A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the "heart of the section," [12] and stated that it "was substantially the same" as the 1912 Act,[13] which as before pointed out, provided for an absolute veterans' retention preference without regard to length of service.[14] And in explaining the Bill on the floor of the House, the

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[11] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8–9.

[12] *Id.* at 29.

[13] *Id.* at 27, 29.

[14] Three veterans' organizations collaborated with the legislative sponsors in drafting the Act. Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8. A representative of one of these organizations stated to the Committee: "This measure gives to honorably discharged veterans of World War I and World War II, their widows, and the wives of disabled veterans who themselves are not qualified, preference in employment where Federal funds are disbursed. It provides, by law, a definite preference both in appointment and retention in Federal positions. While such a preference in many instances now exists by virtue of Executive orders and Civil Service Commission regulations, this bill gives such preference a permanent standing that cannot be changed

sponsor and active proponents of the measure explained it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders.[15]

Not only did the friends of the Veterans Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing the Civil Service Reform League said: "I think you ought to give consideration to . . . retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service." [16] And another witness against the Bill pointed out that under it nonveterans would "be the first to be laid off and the last to be taken on." [17]

Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a

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except by congressional action. The bill, likewise, does not take away from the veteran any rights previously granted under any existing law, Executive order, civil-service rule, or regulation of any department of the Government, but prescribes by law additional preferences and confirms many now existing by regulation." *Id.* at 41–42.

[15] 90 Cong. Rec. 3502, 3503, 3505.

[16] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 33–34.

[17] *Id.* at 63, 65.

policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy.[18]

Affirmed.

[18] It is worthy of note, however, that Congress, in recognition of hardships resulting from replacement of older government employees by veterans, has passed Acts which grant special pensions to employees over 55 years of age who have worked for the Government for 25 years or more and who have been involuntarily separated from the service in reductions in force. 60 Stat. 939; Pub. L. No. 426, 80th Cong., 2d Sess. (Feb. 28, 1948). See 90 Cong. Rec. 9201–9202, H. R. No. 2443, 79th Cong., 2d Sess. 1, S. Rep. No. 1678, 79th Cong., 2d Sess. 1–2.

SUPREME COURT OF THE UNITED STATES

No. 560.—October Term, 1947.

Earle W. Hilton, Petitioner,
v.
John L. Sullivan, Secretary of the Navy, Frances Perkins, Harry B. Mitchell and Arthur Flemming, Members of the Civil Service Commission.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 1, 1948.]

Mr. Justice Reed, concurring.

I agree with the conclusion reached by the Court in this case. My disagreement with the opinion is limited to that portion of subdivision *Second* which indicates that the rights of a veteran as to discharge after restoration to employment by the United States differ from the corresponding rights of a veteran restored to employment by a private employer.

The rights to retention of employment of both veterans are governed by the same subsection 8 (c). 54 Stat. 890. Section 8 (c) specifies the same conditions for retention of employment for all employees whether they are re-employed by the United States or by private employers.

Nothing has come to my attention that indicates to me a congressional purpose to grant to one more rights as to continuity of employment than to the other. The legislation as to both depended upon the same constitutional authority—the War Power. I can see no reason to attribute to Congress an intention to guarantee public employment to a returning veteran regardless of the needs of the public service or to discriminate between equally deserving veterans. Compare *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275.

Mr. Justice Frankfurter and Mr. Justice Jackson join in this opinion.

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Mr. Justice Rutledge, concurring.

I concur in the result. But I do so without expressing opinion concerning the validity of Subgroup A–1 Plus of the Regulations. That classification, as I understand it and the Court's construction of it, gives preference for retention for one year in governmental work to veterans of World War II over all others, including veterans of World War I, regardless of efficiency and length of service whether of the restored veteran or of his competitors. It may be that upon the sum of the legislation Congress intended to give so broad a priority to returning members of the military services. But if so, it is the one instance in which both efficiency and length of service have been absolutely disregarded. And it is at least possible, I think, to read the complex series of statutes bearing on the problem as not having been intended to go so far.

But I do not reach that question, because Subgroup A–1 does take account of efficiency. It gives preference to veterans unless their efficiency rating is less than "good." No specific mention of length of service is made. But while a classification which ignores all considerations both

of efficiency and of length of service might be found unauthorized under the statutory scheme,[1] one which takes due account of efficiency, which is not wholly unrelated to length of service, well might be sustained. And in that event the Commission's judgment that veterans with efficiency ratings of "good" or better should be preferred to all others could hardly be called arbitrary or in excess of the authority conferred.[2]

It is true that when petitioner was separated from service there were some 61 veterans classified A–1 Plus, without efficiency ratings and in priority to himself.[3] But we are informed, and it is not disputed,[4] that 60 of these men now have received efficiency ratings of "good," and

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[1] Depending upon whether § 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. App. § 301, requiring restoration to employment and forbidding discharge without cause for one year, has been qualified by the later enactment of § 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C., Supp. 1946, § 861, quoted in the Court's opinion, particularly the second proviso. See note 2.

[2] The second proviso, cf. note 1, specifies that preference employees (*i. e.*, veterans) with efficiency ratings of "good" or better shall be retained in preference to "all other competing employees," a designation certainly of the most comprehensive scope. The very terms of the section appear thus to place much greater stress upon efficiency ratings than upon length of service.

[3] The practice in relation to these positions has been to withhold efficiency ratings, in this case, for a period of six months, and then to award them on the basis of actual performance.

[4] Ordinarily, of course, rights are to be determined as of the time the interests involved are adversely affected. But it would seem hardly consistent with the legislative scheme that employees with deferred status could defeat the use of a reasonable period to determine the veteran's efficiency rating by actual performance. In any event, the discretionary declaratory judgment remedy should not be applied to oust preference employees entitled to priority over others, even though their status as preference employees is established after trial but before final disposition of the cause on appellate review.

therefore fall into Group A–1 in any event. The other of the 61 has resigned. Hence we are told, and this also is not disputed, that any order of the District Court purporting to require petitioner's restoration would mean that he is entitled to displace one of those veterans.

Since in my view Regulation A–1 is valid, regardless of whether A–1 Plus should stand, and since on the facts now before us Regulation A–1 is sufficient to exclude petitioner from restoration at this time, I do not think he has made a sufficient showing to call forth the exercise of our discretionary power in this proceeding to require the Commission to reformulate the Regulations. Upon the showing made the case is not one appropriate, in my judgment, for application of the discretionary remedy of a declaratory judgment.